IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 254 117

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
DEBTOR.

W. D. WITTER AND JOSEPH WILLENS,
Petitioners,

vs.

G. J. NIKOLAS, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

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SUBJECT INDEX.

LIST OF AUTHORITIES.

STATUTES CITED.

SUMMARY OF ARGUMENT.

1. Where involuntary petition is filed under Chapter X of the Bankruptcy Act and dismissed for want of jurisdiction and appeal taken in due season without restraining order or supersedeas, the action of one of the parties to that proceeding without notice obtaining a partial foreclosure of mortgage on assets of corporation debtor in a State court proceeding during the pendency of the appeal will not deprive bankruptcy Court of jurisdiction of assets of debtor when the ultimate outcome of appeal is a reversal of the District Court order of dismissal and when pursuant to mandate of Court of Appeals, District Court enters an order approving petition as properly filed 13-14

2. When involuntary petition is filed under Chapter X of the Bankruptcy Act, an order entered at any subsequent time approving the petition as filed in good faith relates back to the date of the filing of petition for attaching of the jurisdiction of the Bankruptcy Court and the jurisdiction is exclusive and superior to that of any other court over the assets of the debtor to which the debtor had any title at the time of the filing of the petition.....13-14

3. The action of one of the parties to a proceeding on an involuntary petition for reorganization under Chapter X of the Bankruptcy Act attempting by partial foreclosure in a State Court to obtain title to the assets of the debtor corporation while an appeal from the order of the District Court dismissing the petition is pending is a fraud on both courts and when thereafter the petition is approved

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BRIEF OF RESPONDENTS IN OPPOSITION.

A.

STATEMENT OF FACTS.

The Statement of Facts as they appear in the petitioner's brief are so confused and inaccurate because of error and omissions of essential matters that less space will be used and more clarity achieved by making a new Summary of the Facts than could be accomplished by pointing out the errors and omissions.

The Peer Manor Building Corporation was originally an Illinois corporation. After a dissolution of this corporation for non-payment of taxes, a petition for reorganiza-

tion under Chapter X of the Bankruptcy Act was filed against Peer Manor Building Corporation, an Illinois corporation, by these respondents and an Indenture Trustee as petitioners in what they contended was a pending case. See *In the Matter of Peer Manor Building Corporation*, 134 F. 2d 839. On appeal from the Order of the District Court approving this Petition, the Circuit Court of Appeals, Seventh Circuit, held the District Court to be without jurisdiction, giving two reasons: one, that there was no pending case within the meaning of the statute, and the other, that there was no entity before the court for reorganization. See Opinion of the Circuit Court of Appeals, 134 F. 2d 839. This court denied Certiorari in that cause, 63 S. Ct. 1447, 320 U. S. 211.

On July 8, 1943, an Involuntary Petition under Chapter X of the Bankruptcy Act was filed by the respondents herein as the owners of $95,000.00 in principal amount of first mortgage bonds against the Peer Manor Building Corporation, an unincorporated company. (It was contended that certain persons in interest were carrying on the business of the company after dissolution in corporate manner and form, and hence, constituted an unincorporated company, subject to jurisdiction of the bankruptcy court as such.) Separate answers to this Petition were filed by J. Marshall Peer and L. V. Whitney, two of the alleged members of the unincorporated company or association, and a Motion to Strike was filed by W. D. Witter, a first mortgage bondholder. (These instruments are not shown in the record herein, but do appear in the record filed in this court in the former case No. 404 in this court. The petition appearing on pages 2 to 10 of that record, and the Answer of Peer appearing on pages 11 to 20, and the Answer of Whitney, appearing on pages 20 and 21 of the same record. The Motion to Dismiss filed by Witter appears on pages 22 to 28 of that record.)

This cause was set for hearing on the original Petition and the Answer thereto and on the Motion to Dismiss, which fact is shown in court proceedings on page 29 of the above mentioned record in case No. 404 in this court and as is also recited in the finding of the District Court appearing on pages 64 and 65 of the same record. Hearings were had, evidence was heard, and the court ruled that the issues in this cause were *res adjudicata* by reason of the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the former case reported in 134 F. 2d 839, bearing the same title. An appeal was taken from the order, which appeal was entered on October 14, 1943, and in due course the Circuit Court of Appeals for the Seventh Circuit reversed the District Court and remanded the cause with instructions to the District Court to proceed with the reorganization of the debtor. (Tr. 4.) This decision was made on June 16, 1944, but the Mandate was filed on November 2, 1944, after further proceedings. (Tr. 2-5.) The Opinion of the Circuit Court of Appeals for the Seventh Circuit in this matter appears in 143 F. (2) 769.

The petitioner herein, W. D. Witter, was a party respondent to that Appeal and participated actively therein. He petitioned this court for certiorari, which petition was denied 65 S. Ct. 90.

At the time of the filing of the Petition on July 8, 1943, there was pending a Petition for partial foreclosure by W. D. Witter in the Superior Court of Cook County seeking to foreclose on a basis of a $500 bond held by him. There was also pending a Petition by the Indenture Trustee to foreclose on the entire first mortgage issue of $154,000. The property, however, at the time of the filing of the Petition was in the actual custody of J. Marshall Peer, as agent for one Fred E. Hummel, who had been appointed as trustee in the proceeding filed against the Peer Manor Building Corporation as an Illinois corporation in which

proceeding the court was held to be acting without jurisdiction. A former receiver in the State Court proceeding had been discharged by the State Court, and the property was not by any test in the custody of the State Court at that time. The petitioner herein, however, has not seen fit to bring up the record that covers this phase of the matter. Hence, no reference can be made to the record involved and this Statement is made on the record filed in this Court in Case No. 404. It demonstrates that the petitioner has not produced any of the record upon which to base his contention that the property was in the custody of the State Court at the time of the filing of this Petition.

While the Appeal from the Order dismissing the Petition filed on July 8, 1943, was pending, and while W. D. Witter was participating in that Appeal, he, Witter, on November 8, 1943, without notice to the respondents, who were the appellants in that matter, proceeded to obtain a Decree of partial foreclosure in the State Court without informing the State Court of the pending Appeal in the Bankruptcy Court, all of which is shown by the record filed in Case No. 404 in this Court. Since the District Court dismissed the case, it did not issue any injunction and no supersedeas was obtained. On February 8, 1944, the Superior Court of Cook County, Illinois, entered a supplemental decree ordering a Special Commissioner to convey the property involved to W. D. Witter. (Tr. 20-21.)

On June 16, 1944, the Circuit Court of Appeals for the Seventh Circuit reversed the order of the District Court, as indicated above, and held that the court did have jurisdiction. (Tr. 4.) Petitions for Rehearing were filed by Witter and denied July 13, 1944, and Petition for Certiorari was filed by Witter in this court and denied 65 S. Ct. 90.

After the Mandate of the Circuit Court of Appeals was filed on November 2, 1944, in the District Court remanding the case with direction to proceed for reorganization (Tr.

2-5), on November 20, 1944, Witter filed an Answer (Tr. 5-10). The only matter set up in the Answer of Witter that was not already set up in the Answers of Peer and Whitney, and hence before the District Court when hearings were had on these Answers on September 14, 1943, and other dates previous thereto, was the fact of the completion of the partial foreclosure during the pendency of the Appeal. (This can be determined only by comparison of Witter's Answer 5-10 with the Answer of Peer, which appears on pages 11-20 of the record in case 8472 in the Seventh Circuit Court of Appeals, and the Answer of Whitney appearing on pages 20-21 of the same document which record was introduced as an exhibit in this case in the District Court as Petitioners' Exhibit 1 (see Tr. 2) and which exhibit was before the Circuit Court of Appeals without reprinting by Stipulation of the parties (see Tr. 37-39) but which is not included in petitioners' designation of record herein (Tr. 99) and hence not in the record filed with this Court, but was a part of the record filed in this Court with a former Petition for Certiorari, which was heretofore denied in case No. 404.)

A hearing was had before the District Court on Witter's Answer at which hearing Witter offered Witter's Exhibit A. (Tr. 20-21.)

Also Witter's Exhibit B (not shown in the record herein) was offered. The petitioners offered their Exhibit 1 referred to above. Briefs were filed and the court took the matter under advisement (no report of this hearing appears in the record here but reference thereto appears Tr. 12-13) and Witter's exhibits were reoffered. (Tr. 13.)

The court finally entered an order making specific findings that the petition complies with the requirements of Chapter X of the Act of Congress relating to Bankruptcy, and that the petition had been filed in good faith. (Tr. 22-30.) It was from this order that Witter prayed appeal to the

Circuit Court of Appeals (Tr. 31) and failed to reverse therein, it was upon the affirmation of the same order that he now petitions this Court for Certiorari.

Another fact is drawn into consideration by the petitioner herein, that is the contention that the petitioning creditors in this petition proposed that a new corporation be created to acquire all assets of the debtor and to issue all of its stock to the first mortgage bondholders. This petition, however, is not included in the record filed herein, and hence, is not properly before the Court.

There is also drawn in issue the contention that the petitioning creditors in their original petition did not plead a need for the relief under Chapter X. Again, we note that the petition was not brought up in this record. This petition was before this Court in the record in case No. 404, but also that same record shows that the same question was put in issue by the sixteenth paragraph of Peer's Answer appearing on page 19 of that record, and hence is now sought to be raised for the second time.

Also it is pointed out that in the evidence before the trial court there was not only Petitioner's Exhibit 1 which was the record before the Circuit Court of Appeals in the former proceeding and which has been presented to this Court only in case No. 404 already disposed of, but there was also before the District Court in the proceeding on the original petition Petitioner's Exhibit 1, 1A, 1B, 1C and a part of Petitioner's Exhibit 11, which were filed with the Circuit Court of Appeals but excused from printing. This is shown by pages 69 and 70 of the record in this Court in case No. 404. All of these exhibits were before the Circuit Court of Appeals in this cause below as was urged by the petitioner herein in his petition for rehearing below (Tr. 70) and acknowledged by the Court in its supplement to its Opinion. (Tr. 95.) These last named exhibits constituting evidence

considered by both the District and the Appellate Court do not appear to be before this Court anywhere.

The index to the record herein improperly refers to the "Opinion of Lindley, D. J., filed February 12, 1946." This is misleading. The opinion shown is the unanimous opinion of the Court with three judges participating.

We recognize that some of our references herein are not shown in the record before this Court but we are forced to make references to other documents and records in order to demonstrate to this Court that the petitioner is seeking a Writ of Certiorari based on an abbreviated record and has not presented to the Court many of the essential facts which were acted upon by the District Court and considered by the Circuit Court of Appeals.

We have made references to the record pages wherever the record involved has been filed with this Court.

B.

The Questions Presented.

In the Petition for Certiorari herein there are presented five questions, but in the brief in support thereof, there are listed three "specifications of errors to be urged." These questions in both enumerations are spurious and do not properly arise on the record itself. To answer petitioner's brief without first pointing out the spurious nature of these questions would be to a great extent to engage in shadow boxing on false issues. Hence, we call attention to the following:

On page 4 of the Petition for Certiorari herein, the first question stated is "whether a petition for corporate reorganization under Chapter X, where liquidation and not a readjustment of the rights of creditors was at the very outset the only possibility, which was assailed as to its good

faith by the answer of a creditor was properly approved as filed in good faith," is not properly raised on this record and is a false issue because it is contended by the respondents and found by the court that a reorganization was feasible and was for the best interest of the creditors, and that save the jurisdictional questions raised by these parties the reorganization might have been perfected long ago. (Tr. 60-61.) We do not propose to argue the question as to whether a Petition could properly be approved as filed in good faith where liquidation and not readjustment was at the outset the only possibility since this is not such a case and, therefore, there is no need for attempting to settle here this hypothetical issue.

In the Petition, under question 2, page 4, another false issue is raised as to "whether it was proper to approve an involuntary petition as filed in good faith in the face of an answer contesting good faith without requiring the petitioners to prove the specific facts as required in Sections 130, 131 and 146 of Chapter X." That again is an academic issue for the court found here that these facts had been proved and petitioner, if he wished to test a real issue should have raised the question as to whether there was evidence proving such facts.

The third question on page 4 of the Petition is "whether an involuntary petition for corporate organization under Chapter X was properly approved as filed in good faith when it appeared that the assets of the debtor was less than the amount due on the first mortgage bond issue and that no conceivable plan could be adopted whereby equity owners and other creditors could participate in the reorganization and there was pending a foreclosure proceeding in the State Court for the benefit of the first mortgage bondholders and in the absence of a showing that this proceeding was inadequate to grant the relief." The first part of this question raises possibly a proper issue that might have been

raised on the record, if there had been presented to the court sufficient record to show that no conceivable plan could be adopted as indicated in the stated question. The last part of the question, however, is based on an assumption that there was no showing that this State Court proceeding was inadequate to grant the relief. This is contrary to the finding of the court, as shown by the opinion of the Circuit Court of Appeals. (Tr. 59-66, 60, 61.) It is contrary to the finding of the trial court findings, No. 2 appearing on Tr. page 23 to the effect that the petition complies with the requirements of Chapter X of the Act.

The fourth question presented on page 5 of the Petition for Certiorari is whether the Circuit Court of Appeals was warranted in refusing to postpone the hearing on the appeal from the order approving the petition as filed in good faith when the District Court referred the Plan of Reorganization to a Master in Chancery and stated that "it would reconsider the question of good faith upon the coming in of the report." The balance of this question as it is stated refers to the contents of the Master's Report. The question presented is itself a false issue for the reason that the record does not support the statements in the premise. The court did not state it would reconsider the question of good faith upon the coming in of the report. The court entered a specific and clear cut order finding compliance and good faith. (Tr. 23.) The court did state in the report of the proceedings taken before the Court on March 16, 1945, that although he approved the petition as filed in good faith that if he should find from the evidence on the proposed plan that it was not fair and feasible that then he would not approve the Plan, and that that went back to the question of good faith, and that if he found that there was nothing to reorganize that he would not approve any Plan. (Tr. 18.) The court did not enter the order approving the Petition conditionally or with any understanding to reconsider that

order. Hence, this is a false issue. The question of the duty of the Circuit Court of Appeals to consider or not consider the Master's Report will be dealt with under the Argument.

The fifth question presented on page 5 of the Petition as to the first part thereof states a correct issue and is the only issue properly before this Court on the record in this case, but the last part of the question "or whether the foreclosure proceeding was void and the title acquired thereunder was of no effect, as held in the instant case," is an incorrect statement of the issue. The word "void" should be "voidable" in order to properly state the issue. This issue will be dealt with under Argument.

The specifications of error appearing on pages 15 and 16 of the Brief in support of the Petition for Certiorari herein, three in number, are contractions of the five questions presented on pages 4 and 5 of the Petition which we have commented above and are subject to the same criticism as being false issues. The comment thereon need not be repeated.

C.

ARGUMENT.

Before entering upon detailed rebuttal of petitioner's argument, we wish to point out that the entire argument of the petitioner is based on a false premise and a failure or unwillingness to understand the basis of the opinion of the Circuit Court of Appeals in this case in the following particular.

The entire argument is based on the assumption that the Court of Appeals held that the State Court was without jurisdiction to enter any order of partial foreclosure while the Appeal was pending in this case notwithstanding the fact that there were no restraining orders in effect and no supersedeas had been granted, and the further assumption that the Court of Appeals held that any orders entered by the State Court in the foreclosure proceeding were void. This was not the contention of the Appellants below, nor was it the ruling of the Court of Appeals. The decision of the Court of Appeals is based upon the decision of this Court in *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131, where this Court said:

> "The respondents went forward with the proceedings in the state court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered thereon might be appealed. They are not entitled therefore, to rely on any status acquired in the state court suit as precluding further consideration of the petition for reorganization."

In other words, had the ultimate outcome of this case resulted in the sustaining of the order of the District Court

holding that the matter was *res adjudicata*, and that the District Court was without jurisdiction, then the orders of the State Court taken in the interim would have been valid and effective, but inasmuch as that was not the outcome of the proceeding and inasmuch as the action in the State Court was taken by the petitioner herein with full knowledge of the pending action in the Bankruptcy Court, he took such action at his peril and such titles as he procured by the State Court proceeding were procured by an attempted fraud on the jurisdiction of the Bankruptcy Court and are voidable. The question of the jurisdiction of the Superior Court *per se* is not involved in this matter, and his failure or unwillingness to understand that fact has lead the petitioner herein into much argument and citation of much authority to prove points not really in issue. With this explanation, we proceed to reply to the specific arguments of the petitioner.

REPLY TO PETITIONER'S ARGUMENT DIVISION I.

I.

Under his first heading, page 17 of his brief, petitioner herein contends that the interest of the debtor was extinguished by a foreclosure which ripened in to a deed before the order approving the petition as filed in good faith was entered; and in support of this thesis he seizes on a chance remark of the Court of Appeals which the Court itself referred to as a comment (Tr. 62) to the effect that "the undisturbed custody and administration of the assets have been lodged in the District Court ever since the filing of the Petition for reorganization long prior to the Decree of the State Court."

Petitioner challenges the accuracy of this statement and after having refuted it to his satisfaction, proclaims, "The whole foundation of the opinion is therefore without any support in the record."

The prime fallacy is that this was not the "whole foundation" of the opinion, and besides he did not successfully refute the statement. By his own statement (petitioner's brief page 18) he admits that the Federal Court's Trustee was in possession from June 17, 1942 to September 21, 1943. The petition was filed on July 8, 1943, hence, the Federal Court's Trustee must have been in possession at the time of the filing of the petition.

The real basis of the opinion however is that when the order was entered approving the petition as properly filed and in good faith, it related back to the date of the filing and the jurisdiction of the Bankruptcy Court was continuous and uninterrupted from that time until now.

The court said:

> "The filing of the petition is a declaration to the world that the court has taken jurisdiction under the paramount bankruptcy power of the constitution. Upon adjudication or approval, the title of the Bankruptcy Court reverts to the date of filing; that filing date is the line of cleavage between the debtors estate and that of the court, and anyone knowingly acting in contravention of the court's jurisdiction does so at his peril." (Tr. 62-63.)

This is the foundation of the court's decision.

This foundation is grounded on Sections 502, 511, 512, 514, and 515 of Title 11, U. S. C. A. as well as Sections 110 (a) (c) and (d) and Section 110 (e) of the Act which are cited by the Court in support thereof, (Tr. 63), and the application of the rule therein stated by the Court of Appeals has been sustained by this court in *May* v. *Henderson*, 45 S. Ct. 456, 459; in *Gross* v. *Irving Trust Co.*, 53 S. Ct. 605; and *Isaac* v. *Hobbs Tie and Timber Co.*, 51 S. Ct. 270.

PETITIONER'S ARGUMENT, DIVISION I, SUB. PAR. (A).

The next proposition of the petitioner under his subheading (a) (petitioner's brief page 19) is that in the absence of a restraining order or a supersedeas during the pendency of the appeal, the State Court properly completed the foreclosure proceedings. Under this heading, petitioner contends that there was no pending case in the Bankruptcy Court at the time that the foreclosure was completed. He bases that on the fact that on September 13, 1943, the District Court entered an order of dismissal (The order of dismissal was entered on September 14, 1943, but the error is not material here) and according to his contention from the time that the order of dismissal was entered until that order was reversed by the Court of Appeals there was under his theory no pending case in bankruptcy.

This Court has held to precisely the contrary rule. In the case of *Mackenzie* v. *A. Engelhardt & Sons Co.*, 45 S. Ct. 68, this court said on page 69,

"An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of,"

and petitioner does not dispute that on October 14, 1943, an appeal was taken and that the appeal was pending from that time until the Court of Appeals acted thereon reversing the order of the District Court and it is not disputed that it was during this period that the partial foreclosure was obtained, and that the supplemental order directing the issuance of a deed to Witter was obtained; nor is it disputed that Witter was party respondent to the appeal, participated therein, and was thereafter petitioner for a Writ of Certiorari to review the order of the Circuit Court of Appeals which reversed the District Court. Therefore, the Court of Appeals is correct both in fact and in law in arriving at the conclusion that the petitioner Witter knew at the time that he proceeded to complete this partial foreclosure without notice to the other parties to the Federal Suit, that in doing so, he was impinging upon and attempting to defeat the jurisdiction of the Bankruptcy Court which vested from the time of the filing of the petition, and that he could prevail only if he were successful in his challenge to the jurisdiction of the Bankruptcy Court on the petition itself. True, the District Court had held itself to be without jurisdiction, but that very question was put in issue by the appeal and was being contested at the very time that the petitioner was completing his partial foreclosure. A restraining order or a supersedeas while they would have barred action by the State Court, would not have gone to the question of the State Court's jurisdiction, but would merely have arrested its proceeding.

The logical conclusion is that the State Court had jurisdiction to act on the subject matter, if its jurisdiction had

not been supplanted by the Bankruptcy Court. Hence, had the ultimate conclusion been that the Bankruptcy Court was without jurisdiction, the action of the State Court would have been valid; but since it was ultimately concluded that the Bankruptcy Court did have jurisdiction from the time of the filing of the Petition, then the action of the State Court became voidable, and the petitioner acted with full knowledge of this and of the possibility that the jurisdiction in the Federal Court would be established and when he did so, he did so at his peril, that such jurisdiction would be established. Hence, the Circuit Court of Appeals was justified in its finding that

> "his persistence was an idle and fruitless attempt to defeat the District Court's jurisdiction and, indeed, an attempted fraud upon the court."

It is the failure of the petitioner herein to distinguish between the character of the State Court's order as being void or voidable which leads him into an erroneous argument. In any event it is not necessary to hold the action of the State Court either void or voidable from a strictly procedural standpoint in order to sustain the decision of the Circuit Court of Appeals because the Circuit Court of Appeals points out that the petitioner having acted at his peril and with full knowledge, he may be compelled to undo by proper conveyance to the Trustee of the Bankruptcy Court whatever he has accomplished by his proceeding in the State Court.

PETITIONER'S ARGUMENT, DIVISION I, SUB. PAR. (B).

The petitioner's next proposition under his sub-heading (b) (page 22-23 petitioner's brief) is that the court failed to notice the distinction between ordinary bankruptcy and the proceeding under Chapter X, and that its decision is a variance with views of other circuits and with its own views in other cases.

Petitioner's argument under this sub-heading that the dismissal of the petition was a negation of any effect accomplished by the filing thereof is answered by this Court in the decision of *Mackenzie* v. *Engelhardt & Sons Co.*, 45 S. Ct. 68, which we have quoted from above to the effect that an appeal is a proceeding and the suit is pending until the appeal is disposed of, and is further answered by this Court in the case of *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 57 S. Ct. 382, in which this court said where respondents went forward with the proceedings in the State Court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered thereon might be appealed. They are

> "not entitled, therefore, to rely on any status acquired in the State Court suit as precluding further consideration of the petition for reorganization."

In that case there was no appeal pending, merely a Motion for Rehearing and that case was not in what petitioner calls ordinary bankruptcy proceeding, but did involve a suit for reorganization under the bankruptcy act.

In this same argument, petitioner relies upon the case of *In the Matter of Ella Tinkoff*, 141 F. (2d) 731, which he contends distinguishes the rule in the *Isaac* v. *Hobbs Tie and Timber Co.* and the case of *Gross* v. *Irving Trust Co.*, which we have referred to above from this case. The fact, however, is that the case cited by the petitioner is no authority whatsoever for his contentions. The distinguishing feature being that in this case, there was ultimately an order approving the petition as properly filed which related the jurisdiction back to the date of the filing of this petition, whereas, in the Tinkoff case, there never had been an adjudication in Bankruptcy or a finding that the petition was properly filed in good faith. Hence, there was no question of vested jurisdiction relating back from such finding to

the time of filing of petition as there is in this case. Petitioner cites only 141 F (2d) 731 as to the Tinkoff case. The facts involved in that case demonstrating the distinctions that we have made are shown in the former appeal in the same matter entitled *In Re The Matter of Ella Tinkoff*, 85 F. (2d) 305. It is necessary to read both decisions in order to obtain all the facts and when that is done, it is clear that that decision is in no wise in conflict with the decision in this case. That case is also distinguished from this case by the fact that the State Court was in possession of the property when the petition in bankruptcy was filed. Whereas, in this case the State Court was not in possession at the time of the filing of the Petition. We do not deem this, however, fundamental. For all that the Tinkoff case holds is that the mere filing did not of itself oust or affect the jurisdiction of the State Court, but that is not to say that the filing when coupled with the approval of the petition as properly filed at a later date did not do so.

PETITIONER'S ARGUMENT, DIVISION I, SUB. PAR. (c).

The petitioner herein under sub-heading c (page 23 petitioner's brief) complains that the opinion of the Circuit Court of Appeals failed to notice the distinction between a foreclosure completed in the absence of a supersedeas and the case where the appeal operated as a supersedeas which he says is distinguished by this court in the cases which were cited by the Court of Appeals.

Petitioner asserts that the *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 57 S. Ct. 382, 300 U. S. 131, is distinguished from this case by the decision of this Court in *Union Joint Stock Land Bank of Detroit* v. *Byerly*, 60 S. Ct. 773, and attempts to draw the distinction by assertion in the *Wayne* case that there was a supersedeas, and that while, as pointed out in the *Wayne* case the bankruptcy

jurisdiction superseded the State Court jurisdiction it "again attached" upon dismissal of the bankruptcy case, and that the State Court had the right to proceed with the foreclosure and that its procedure "was as if no bankruptcy case had ever existed." The fallacy in this argument is that it rests on a misconstruction of both the *Wayne* case and the *Union Joint Stock Land Bank of Detroit* v. *Byerly* case. In the *Wayne* case, the facts as stated in the opinion of this Court (pages 383 and 384) are that the petition filed in that case was dismissed on March 2, 1936, and a Petition for Appeal presented to the Circuit Court of Appeals on March 20, 1936, was denied on April 15, 1936, because it was filed under the wrong section of the bankruptcy act, and that on April 17, 1936, petitioner served notice that it would on April 24, 1936, pray an order vacating the order of March 2 and for a rehearing and review of all matters involved in the proceedings. This petition was presented and was taken under advisement and on May 12 was granted to the extent of setting aside the order of March 2, and setting the matter for rehearing and review on May 22, on which date a second amended and supplemental petition was filed and objections filed thereto and this petition was dismissed on May 28. On June 11 petition for appeal was granted and at that time a supersedeas was granted. The action in the State Court, however, took place after the order of March 2 dismissing the petition. In that case prior to the filing of the bankruptcy reorganization petition, the property had been in the hands of a State Court receiver and the trustee of the first mortgagee intervened into the receivership and sought the foreclosure and the State Court had ordered a sale and the decree had become final before the petition for reorganization. The remaining action was a conformation of the sale, and this is the action which took place after March 2 at a time when the petition stood as dismissed. In fact the

Circuit Court of Appeals dismissed the petition also in that case and it was only in this court when it reviewed the matter that it was reinstated. The exact date is not shown, but the statement of the Court that the proceedings in the State Court went forward "with full knowledge that a rehearing might be granted and that the order thereon might be appealed" (57 S. Ct. 382, page 384) demonstrates that the action in the State Court relied upon took place after March 2, 1936, and before the granting of the Petition for Rehearing on May 12, 1936. The supersedeas was not granted until June 11, 1936, hence the distinction sought to be drawn by the petitioner in this case is a false distinction. There being no supersedeas in effect in the Wayne case at the time of the State Court's order. In fact, there was not even an appeal pending. There was merely the Petition for Rehearing of an order from which the appeal had already been denied by the Circuit Court of Appeals. Hence the parties proceding in the State Court relied not only on the District Court finding of a lack of jurisdiction but on the conformation thereof by the Circuit Court of Appeals. But this court held that that was not enough to destroy the jurisdiction of the bankruptcy court.

There is nothing in the decision of this court in the *Union Joint Stock Land Bank of Detroit* v. *Byerly* case, 60 S. Ct. 773, which distinguishes the case at bar from the application of the rule in the *Wayne United Gas Co.* case. It is true this court did say that when the proceeding was dismissed in the bankruptcy court that "the termination of the bankruptcy proceeding restored the jurisdiction and power of the State Court, and further said that the State Court's jurisdiction "again attached upon the dismissal of the bankruptcy case." But this language must be considered in connection with what the Court was talking about. That was a case in which the suit had been dismissed on grounds of unconstitutionality of the act under

which it was brought. The Motion to Reinstate was made after the action in the State court entering a decree confirming the sale and after the authorization of and execution of a deed by the sheriff and the recording thereof and the taking of possession by the purchaser, (see 60 S. Ct. 773) and the reinstatement was pursuant to amendment of the laws which took place after the dismissal. Hence, at the time of the State Court action in that case the bankruptcy proceeding stood properly dismissed on constitutional grounds and the reinstated proceeding was one under a newly enacted statute, and this court held that this enactment of that statute did not by its terms reinstate the proceedings but only afforded grounds therefor which came into action only when the parties moved to reinstate it. Hence, as this court properly said on page 777 Supreme Court edition "in the interim, no bankruptcy case was pending and the State Court had jurisdiction to proceed as it did," and this court itself in that opinion distinguished the case from the Wayne case by pointing out on page 777 of the opinion that the action in the Wayne case was taken with notice of the filing of the Petition for Rehearing after the dismissal and that the parties there acted at their peril having that notice. In the case at bar the facts are stronger in favor of the jurisdiction because here there was actually an appeal pending and further the facts in the *Wayne United Gas Co.* case were not nearly so strong as in this case from another standpoint for, in that case the decree had been entered by the State Court before the petition was even filed. Here there was merely a pending proceeding, no decree having been entered. The only decree entered in the Wayne case by the State Court after bankruptcy petition was filed was the decree conforming the commissioners' sale. The decree of sale had already become final before the Petition

was filed. (See 57 S. Ct. 384.) Not only that but the State Court was in possession of and administering the property at the time the petition was filed. Such was not true in this case.

Petitioner herein makes a further contention that the Wayne case is distinguishable on the grounds that no restraining order could have been issued prior to the approval of the petition in that case. We submit that is beside the point because whatever might have been done prior to the approval of the petition, the petition had been dismissed and we submit the contention that the petitioning creditors here could have been expected to obtain a restraining order from the District Court which held itself to be without jurisdiction is a curious type of reasoning. The petitioning creditors might have obtained a supersedeas order from the Appellate Court but to do so it would have been necessary to have filed a supersedeas bond and thereby would have entailed additional expense which was not necessary to constitute a pending case as we have pointed out under the rule of this court. *Mackenzie* v. *A. Engelhardt & Sons Co.* 45 S. Ct. 68, 69.

Further argument of the petitioner herein on page 25 to 28 that the respondents having failed to avail themselves of their right to a restraining order and having failed to inform the State Court of the pendency of the bankruptcy proceeding must abide the consequences of such failure or neglect is another form of arguing that it was necessary to file a *lis pendens* in the State Court proceeding. We wish to point out that under the terms of the bankruptcy act itself the *lis pendens* was not necessary to be filed. Sub-division g, Section 44 Title 11 U. S. C. A. provides the method for filing a *lis pendens* in order to defeat a judicial sale of property when the estate is brought into the bankruptcy court by the filing of a petition therein; and it re-

quires thereunder the filing of a certified copy of the petition with schedules omitted, or of the decree of adjudication, or of the order approving the trustees bond, in the office where conveyances of real property are recorded in the county where the bankrupt owned or had interest in real property. But this very statute provided an exception thereto as follows "provided, however, that this subdivision shall not apply to the county in which is kept the record of the original proceedings under this title" and in this particular case the property was located and the record of the original proceedings were kept all in Cook County in the State of Illinois. Hence, no notice was necessary to the State Court. The pending proceeding was itself sufficient notice. In fact the notice of the pending proceeding was on file two places in Cook County, both in the District Court and in the office of the Clerk of the Seventh Circuit Court of Appeals which office is also in Cook County, Illinois.

We suggest in passing that if there were any merit to the contention that the State Court was not informed of the bankruptcy proceeding, which there is not, then petitioner herein would hardly be in a position to claim the benefit thereof when it was he who carried the proceedings forward in the State Court with full knowledge of the bankruptcy proceedings and without affording any notice to the respondents herein who were parties to the proceedings of his contemplated action in the State Court.

All of the remaining arguments of the petitioner under Division I of his Brief to the extent that they have any direction apply to the question of whether the filing of the petition *per se* ousted the jurisdiction of the State Court, and do not touch on the questions here involved as to whether the approval of the petition relates back to the date of the filing thereof and makes the jurisdiction of the

bankruptcy court continuous from the date of the filing of the Petition and whether a party to the bankruptcy proceeding who knowingly has attempted to defeat that jurisdiction by taking steps, without notice to his opponents, in the State Court, and without informing the State Court of the pending action, can profit by his wrong, or whether he can be required by the bankruptcy court to make restitution of the wrong that he has attempted by surrendering anything he has obtained as a result thereof. Certainly his grantee with knowledge could take no greater interest than the transgressor himself had.

We submit that the decisions of the Circuit Court of Appeals in this case is not at variance with the decisions of this court in any of the cases cited by the petitioner under this division or in any part of his Brief.

Reply to Petitioner's Argument, Division II.

Under his Division II found on page 28 and following pages of his brief herein petitioner contends, as we understand it

1. That where property is valued less than the first mortgage bond issue, there can be no reorganization under Chapter X.

2. That where the petition alleges that a debtor's property should be liquidated for the benefit of one class of creditors, it should not be held to be in good faith.

3. That petitioning creditors must both allege and prove insufficiency of the prior proceedings and need for relief.

With respect to the first of these proposals, the petitioner herein is in error in his premise. Neither *Marine Harbors Properties* v. *Mfgrs. Trust Co.*, 63 S. Ct. 93 cited by petitioner, nor any other case that we have found holds as a postulate that there can be no reorganization where the

debtor's property is of less value than a first mortgage bond issue. The cases cited merely hold that to be an element for consideration by the Court in determining the issue of good faith. To hold that there could be no reorganization under those circumstances under Chapter X would be to nullify the provisions of Sub-chapter 10 of Chapter X, (Section 616, Title 11, U. S. C. A.), under sub-paragraph 8 thereof where the statute in dealing with the rights of stockholders provides for their protection but adds this "provided, however, that such protection shall not be required if the judge shall determine that the debtor is insolvent."

The question of insolvency itself is one of the issues to be determined in the case and is not wholly determinative of jurisdiction but goes to the kind of plan that may be effected. And in any event there is no record before this court on that question nor is there any record which shows that only one class of creditors are to be dealt with. Such record as there is, indicates that on the proposal of petitioning creditors, those having priority by law such as taxes as well as the first mortgage bondholders and Witter who held a judgment or a decree on a subordinated first mortgage bond are to be dealt with. Also the record indicates that the stockholders claim an interest in monies on hand (Tr. 17-18) and have litigation pending in the State Court on that matter. What if any provisions a feasible plan will make for any or all of these groups is not now before the court. It is true that the petitioning creditors propose that nothing be allowed to claimants junior to the first mortgage bondholders. Whether a plan to be submitted would follow that suggestion is to be determined within the discretion of the Court. If the stockholders had no interest because of insolvency, a plan not only could be, but would have to be submitted which would eliminate

them as parties in interest. *Case et al.*, v. *Los Angeles Lumber Products Co., Limited*, 308 U. S. 106, 60 S. Ct. 1, *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, 61 S. Ct. 675.

The second proposal of the petitioner herein under subheading No. 2 is an academic issue, the merits of which need not be determined. The original petition herein did not allege that the property should be liquidated at all, but merely asserted that liquidation of the assets was the only alternative to reorganization under Chapter X and suggested a plan for giving stock to the first mortgage bondholders and that nothing of value be given to the parties having interest junior to the first mortgage bondholders, but also suggested that the business be carried on under corporate structure and that the value of the assets be preserved by avoiding liquidation, all of which appears in the petition on pages 20 and 21 of the Transcript filed in this court in case No. 404, but no where appears in the record herein. Nor does the petition at all appear in the record herein. Evidently, the petitioner herein did not think enough of his point to bring up the petition he now attacks.

The petitioners' third point has several answers. We believe a sufficient one is that the original petition did allege the inadequacy of the prior proceeding to preserve the values of the estate herein involved and did allege the need for relief. There could be no reorganization in the foreclosure proceeding which would not necessitate either a unity of bondholders in their action or a liquidation of the interest of some bondholders to the advantage of other bondholders who acted together to bid at a liquidation sale. True, the State Court might offer the minority bondholders an opportunity to participate in a plan which the majority formulated. On the other hand in this proceed-

ing the entire group of bondholders would be controlled by the two-thirds majority provided by statute in favor of any plan which the Court found to be fair, equitable and feasible. It was to preserve the going concern value and continued operation value of the property rather than to effect a liquidation that this petition was filed. Findings of the facts alleged and proved are set forth in considerable detail in the Opinion of the Circuit Court of Appeals (Tr. 60-61). These findings, petitioner seeks to overcome by assertion and argument, but did not bring the record before this Court on which these findings are grounded. He seeks to have this Court assume that there was no evidence before the District Court, but he has tendered no certificate that the record he presented contains all the evidence below. For this purpose he cannot rely upon the approval of the transcript as to accuracy (Tr. 19) for that report covers only the proceedings of the day indicated, nor can he rely on the clerk's certificate (Tr. 38) for this certifies only as to matters called for by his designation of records. On the contrary it is shown by the opinion of the Court of Appeals that evidence was offered at the original hearings on the original petition which was still before the Court when the order here complained of was entered and that that evidence was reoffered. (Tr. 60.)

Petitioner ignores the fact that prior to the former appeal, evidence was heard on the original petition and the answers filed thereto as well as his Motion to Dismiss and that the complete record was presented to the Circuit Court of Appeals in case No. 8472, and that after a full consideration and a denial of certiorari by this Court in case No. 404, a Mandate issued directing a reorganization and that these same points were raised in the answers which were before the Court of Appeals and were concluded by the Mandate. Section 545, Title 11, U. S. C. A. provides that

when "any issue raised in an answer filed under Section 536 or 537 of this title has, * * * already been tried and finally determined under the provisions of section 543 or 544 of this title, such final determination shall be conclusive for all purposes under this chapter."

Your petitioner herein who had participated in those hearings when he filed his answer raised precisely the same questions that had been heard already except his issue as to the completion of the partial foreclosure. This was the only new question. This Court does not have before it in this cause the transcript of the oral testimony taken on the original hearings, but the District Court had it, and the Court of Appeals had the record of it.

The petitioner incorrectly asserts on page 36 of his brief that no evidence was offered in support of the petition "except that the petitioning creditors attached to their brief the record on the previous appeal." The record does show that the document to which he refers was offered in open court and received in evidence as petitioners' exhibit 1 (Tr. 13) but it was not brought up nor was Witters' Exhibit B which was also admitted (Tr. 13) nor was exhibits 1, 1a, 1b, and 1c which were exhibits offered in the earlier hearing and excused from printing in case No. 8472 in the Circuit Court of Appeals but which were brought up before that court in the case below (See Tr. 70 for assertion by petitioner herein to that effect.) They do not appear to be before this court in any record, but the court below said in its supplemental opinion that it had examined these unprinted exhibits "and find that they substantiate fully the conclusions we reached." (Tr. 95.) How can this court say they do not when they are not before this Court? Where errors are assigned that depend upon the construction of evidence or instruments that do not appear in the record, the judgment of the court below

will be affirmed. *Red River Cattle Co. of Texas* v. *Sully,* 144 U. S. 209, 12 S. Ct. 809. It is true that the burden was on the petitioning creditors to plead and prove their need for relief, but when they did that and the Trial Court found their need for relief, it was then presumed that the findings were correct and then the burden is on the parties contesting those findings to overcome this presumption. *Le Blanc* v. *Fidelity Trust Company,* 65 F. 2d 442 (C. C. A. 1), *Bassett* v. *Claude Neon Federal Company of Kansas,* 65 F. 2d 526 (C. C. A. 10) *Hunter* v. *Commerce Trust Company,* 55 F. 2d 1, 4 (C. C. A. 8) and this must be overcome by showing that the trial court was wrong. The petitioning creditors showed by the evidence below that this was the only proceeding in which all the issues could be settled and that it was more expeditious. All of those matters and all of that evidence was considered by the Circuit Court of Appeals in case No. 8472 when the court said in that case that "considering all the evidence * * * we conclude that the Peer Manor Building Corporation, after its dissolution, as the evidence shows it was conducted, was an unincorporated company or association, and as such *was properly subject to reorganization under said Chapter X*" (143 F. 2d 769, 772), and the court on that record issued its Mandate to the District Court with "directions to proceed with the reorganization of debtor." (Tr. 4.) All of these issues having been concluded in the former appeal, Witter placed before the court merely one new issue that of the effect of the partial foreclosure.

On page 38 of his brief, petitioner herein contends that no opportunity was given to try the facts as to good faith, and that that was referred to the Master. The Court did tell the petitioner herein that he could present to the Master certain matters of proof that he was offering. That, as we take it, was on the Court's theory that good

faith must continue throughout the case, and that if he could show evidence before the Master that would show that good faith no longer existed then the Court would have to consider that on whether to continue to proceed with the reorganization and act upon a plan. What the Court meant by that is illustrated by his remark appearing on page 18 of the record that "if I find after the hearing and the evidence, that it is not fair and feasible, then, of course, I would not approve the plan, and that goes right back to the question of good faith." The fact that the Court entered this order appearing on pages 22 to 30 of the Transcript of the Record is conclusive that the Court did approve the petition as filed in good faith and did not refer that question to the master. In the case below the petitioner herein did file in the Clerk's Office of the Court of Appeals a document purporting to be a Master's Report rendered the 3rd day of January, 1946, which is included in the Transcript of the Record on pages 46-56; and there was filed a paper denominated a Motion to Postpone Oral Argument and the consideration and disposition of this cause until after the District Court judge should have determined the cause upon its merits (Tr. 44) and in support of that alleged motion there was filed a paper called Suggestions in Support of Motion to Postpone Determination of this Appeal, and the copy of the alleged Master's Report was attached to these suggestions which appear on Transcript pages 45 and 46. The Clerk certified that these papers were filed in his office, but the motion itself is not signed by any counsel and the suggestions are not signed by any one. They contain a form of verification but no verification. So from a procedural standpoint, there was no Motion before the Court and no suggestions sponsored by any one. These papers were filed in the Clerk's office on January 26, 1946, whereas the order appealed from was entered

on March 16, 1945, and the Master's Report purported to have been made on January 3, 1946 (Tr. 56). Certainly, a Master's Report filed more than 9 months after the entry of an order, could be no grounds for reversing or sustaining that order, it not having been in existence at the time of the entry of the order, nor is it any part of the record in this proceeding. No leave of Court was ever obtained to file it, and Petitioner herein complains on page 38 of his Brief that the Circuit Court of Appeals entirely ignored this report. We submit that there is nothing else that the Circuit Court of Appeals could have done without committing error, other than to ignore the report.

Further, we wish to point out that the Master was wholly without jurisdiction as to any matter involved in this appeal. (*Newton* v. *Consolidated Gas Co. of N. Y.*, 42 S. Ct. 264.) The Master's Report recites that it was made on a stipulation of the parties which is not shown in the record and while these respondents admit that they entered into a stipulation with respect to the taking of testimony before the Master, they made no stipulations of such purport as the Master's Report indicates in his opening statement and the Master was without any jurisdiction to act upon any matter that was involved in this appeal. The District Court, once having entered its order, and that order having been appealed from, it lost jurisdiction to change the order. We respectfully submit that this Court should properly do what the Circuit Court of Appeals did, that is entirely ignore the alleged Master's Report. In any event the Master's Report does nothing other than take an opposite view to that taken by the Circuit Court of Appeals. Hence, it serves no other purpose than that of and additional brief and argument for petitioner. The contention of the petitioner that he had had no opportunity to offer his proof until the matter reached the Master is

without merit. There was before the District Court Witter's Exhibit A which showed the completion of the partial foreclosure in the State Court, showed that a deed had issued, and there was no dispute of this fact. Hence, no necessity existed to take testimony before the Master to establish this fact. The Master's conclusions from this fact are merely conclusions and carry no additional weight.

Reply to Petitioner's Argument, Division III.

Under his division III petitioner herein advances the theory that jurisdiction in the absence of a restraining order and a supersedeas on appeal attached from the date of the approval of the petition and not from the filing date. He cites no authority which sustains this view. Apparently he relies upon a theory of convenience in this case that to permit jurisdiction to attach from the date of the filing of the petition is inconsistent with the provisions of the Bankruptcy Act and hence, does not apply under Chapter X. On that he argues that all the provision of Chapter X with respect to application of the other sections of the Bankruptcy Act attaching jurisdiction and conferring title on trustees are controlled by the provision of Section 511, Title 11, U. S. C. A. which contains the words "where not inconsistent with the provisions of the Act" and that this demonstrates that it was not the intent of Congress to permit the approval of a Petition to affect pending foreclosure proceedings unless a temporary restraining order was issued. If that had been true, Congress would not have permitted Section 110a Title 11, U. S. C. A. to include petitions proposing arrangements and plans as well as petitions in Bankruptcy. This section reads in part:

> "The Trustee of the estate of a bankduptcy and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by

> operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or *of the original petition proposing an arrangement or plan under* this title." (Italics ours.)

and in the same section further on, it reads:

> "The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court."

Hence, it is clear that there is no foundation whatever to this theory of convenience which petitioner herein has formulated for this case. The authorities (statutory, and court decisions), which make it clear that the jurisdiction of the court upon the approval of the petition relates back to the date of the filing thereof have been cited earlier in this brief and need not be here repeated.

D.

Conclusion.

From an analysis of the record in this case, we conclude:

1. That the various questions other than the question of the effect of the partial foreclosure involved herein are raised in this Court without a record upon which the Court can determine the validity of the objections to the order below.

2. That if the Court may consider the records in the two previous appeals as requested by the petitioner herein, the record is still deficient in that it does not contain all the exhibits submitted to the District Court and before the Circuit Court of Appeals in this proceeding below.

3. That upon a consideration of either the record actually before this Court or of the entire record which was before the Circuit Court of Appeals, the opinion of the Circuit Court of Appeals is sustained.

4. That with respect to the partial foreclosure, the facts relative to it are not in dispute and hence are properly before this Court. The partial foreclosure did not and could not oust the jurisdiction of the bankruptcy court for that

(a) The property of the debtor was in the possession and custody of an officer of the bankruptcy court at the time of the filing of the original petition herein.

(b) The petitioner herein was a party to the proceeding in the bankruptcy court throughout.

(c) The decree of partial foreclosure and the decree confirming the issuance of a deed to Witter in the partial foreclosure proceeding were sought and entered while this bankruptcy proceeding was pending on appeal in the Circuit Court of Appeals with full knowledge of Witter, who was the moving party in the foreclosure proceeding and who took this action without notice to the petitioning creditors in this proceeding.

(d) The action of Witter in attempting to thus oust jurisdiction of the bankruptcy court was a fraud on both courts.

(e) Any action of the State Court taken during the pendency of the Appeal was subject to the superior jurisdiction of the bankruptcy court, and hence, became voidable upon it having been established that the bankruptcy court did have jurisdiction.

(f) The property of the debtor, the office in which the record of titles is kept, and the office where the record of this bankruptcy proceedings were kept were all in Cook County, State of Illinois, and hence no *lis pendens* notice was necessary to prevent an alienation of this property from jurisdiction of the bankruptcy court by any judicial sale.

(g) The petitioner herein Witter, having brought about

a proceeding in the State Court with full knowledge of, and while he was a party to, the pending proceeding in the bankruptcy court can be compelled by the bankruptcy court to make restitution and he or his nominee Willens can be required by the bankruptcy court to make such reconveyance as to reinstate the title (free from any cloud) in the bankruptcy trustee, if such action is necessary to clear the title to the real estate from any cloud.

For the foregoing reasons, we conclude that the petition for certiorari ought to be denied at the cost of petitioner.

Respectfully submitted,

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